APPEAL NO. 010806

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 29, 2001. With respect to the sole issue before her, the hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the 15th compensable quarter. The appellant (carrier) urges on appeal that this determination is against the great weight of the evidence because the claimant did not make a good faith effort to obtain employment commensurate with his ability to work. The claimant urges affirmance.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

The parties stipulated that on _____, the claimant sustained a compensable injury; that the claimant reached maximum medical improvement on May 20, 1996, with an impairment rating of 20%; that the claimant has not commuted any portion of his impairment income benefits; that the qualifying period for the 15th quarter began on September 27, 2000, and ended on December 26, 2000; and that the 15th quarter began on January 9, 2001, and ended on April 9, 2001.

Sections 408.142 and 408.143 provide that an employee continues to be entitled to SIBs after the first compensable quarter if the employee: (1) has not returned to work or has earned less than 80% of the employee's average weekly wage as a direct result of the impairment; and (2) has in good faith sought employment commensurate with his or her ability to work. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(e) (Rule 130.102(e)) provides that a claimant with an ability to work "shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts." At issue in this case is whether or not the hearing officer committed error in finding that the claimant sought employment in good faith commensurate with his ability to work.

Rule 130.102(e) provides:

> (e) Job Search Efforts and Evaluation of Good Faith Effort. Except as provided in subsection (d)(1), (2), (3), and (4) of this section, an injured employee who has not returned to work and is able to return to work in any capacity shall look for employment commensurate with his or her ability to work every week of the qualifying period and document his or her job search efforts. In determining whether or not the injured employee has made a good faith effort to obtain employment under subsection (d)(5) of this section, the reviewing authority shall consider the information from the injured employee, which may include, but is not limited to information regarding:

(1) number of jobs applied for throughout the qualifying period;

(2) type of jobs sought by the injured employee;

(3) applications or resumes which document the job search efforts;

(4) cooperation with the Texas Rehabilitation Commission;

(5) cooperation with a vocational rehabilitation program provided by a private provider that is included in the Registry of Private Providers of Vocational Rehabilitation Services;

(6) education and work experience of the injured employee;

(7) amount of time spent in attempting to find employment;

(8) any job search plan by the injured employee;

(9) potential barriers to successful employment searches;

(10) registration with the Texas Workforce Commission; or

(11) any other relevant factor.

Regarding these factors, the record reflects the following: that the claimant has an eighth grade education; that he had worked exclusively in a manual labor capacity prior to his injury; that he has an ability to perform sedentary work; that he is not able to drive; that he made 29 job searches from September 26, 2000, through December 29, 2000; and that he made at least one job search per week during the qualifying period. In an effort to obtain employment, the claimant reviewed newspaper classifieds, made phone calls, utilized an employment service, and inquired in person at potential places of employment, but he did not submit applications or resumes.

Applying our standard of review, as well as the requirements of the 1989 Act and the rules cited above, we find no error in the hearing officer's determination that the claimant was entitled to SIBs for the 15th compensable quarter. We have previously held that the question of whether a claimant made a good faith job search is a question of fact. Texas Workers' Compensation Commission Appeal No. 94150, decided March 22, 1994; Texas Workers' Compensation Commission Appeal No. 94533, decided June 14, 1994. Section 410.165(a) provides that the hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v.

Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals-level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). When reviewing a hearing officer's decision for factual sufficiency of the evidence, we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust and we do not find it to be so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

The carrier additionally urges on appeal that the hearing officer's finding that the claimant made 28 job searches during the qualifying period is against the great weight of the evidence. Our review of the record indicates that from September 27, 2000, through December 26, 2000, the stipulated qualifying period, the claimant documented 26 job searches. However, the SIBs application which was sent to the claimant and, presumably relied upon by him, indicated that the qualifying period ran from September 26, 2000, through December 25, 2000. The record reflects that during that period of time, the claimant documented 27 job searches. In either event, the hearing officer found, and the record reflects, that the claimant still satisfied the weekly job search requirement. Under these circumstances, and in light of the fact that the carrier provided incorrect dates for the qualifying period to the claimant, whether the claimant made 26, 27, or 28 job searches during the qualifying period has no impact on the hearing officer's decision and order that the claimant is entitled to SIBs for the 15th compensable quarter.

The decision and order of the hearing officer are affirmed.

Gary L. Kilgore
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Michael B. McShane
Appeals Judge